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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-325

BERLIN L. LAWSON,

Petitioner,

v.

BURLINGTON INDUSTRIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 2

ARGUMENT 3

I. The Court of Appeals' Determination that Petitioner has not made a showing of equitable considerations sufficient to toll the Statute's filing requirement is in accordance with the general principles of equity enunciated by this Court, is not in conflict with any ruling of any other circuit Court of Appeals, and does not present an important or unsettled question of federal law.

II. The Court of Appeals' Conclusion that Petitioner's EEOC charge alleging discriminatory layoff was not sufficiently broad to support a subsequent action for alleged discriminatory failure to rehire is in accordance with the general principles enunciated by this Court and does not present an important or unsettled question of federal law 11

CONCLUSION 16

APPENDIX

TABLE OF AUTHORITIES

CASES:

Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978) 5,7

Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977) 15

CitiCorp Person-to-Person Fin. Corp. v. Brazell, 658 F.2d 232 (4th Cir. 1981). 10

Cutright v. General Motors Corp., 486 F.Supp. 590 (W.D. Pa. 1980) 15

Davis v. RJR Foods, Inc. 420 F.Supp. 930 (S.D.N.Y. 1976), aff'd mem. 556 F.2d 555 (2d Cir. 1977) 8

Delaware State College v. Ricks, 449 U.S. 250 (1980). 9

Doski v. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976). 8

EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976). 14

Greene v. Carter Carborator Co., 532 F.2d 125 (8th Cir. 1976). 9

King v. Seaboard Coastline R.R. Co., 538 F.2d 581, 583 (4th Cir. 1976) 14

Krzyzewski v. Metropolitan Government, 584 F.2d 802 (6th Cir. 1978) 8

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 11

Love v The Pullman Co., 404 U.S. 522 (1972) 13

Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976) 11

Mazzare v. Burroughs Corp., 473 F.Supp. 234 (N.D. Pa. 1979) 15

Morris v. Frank IX & Sons, Inc., 486 F.Supp. 728 (W.D. Va. 1980) 15

Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981) 8

Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (en banc.) 9

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 4,13

Payne v. Crane Co., 560 F.2d 198 (5th Cir. 1977) 8

Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975) 10

Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982). 10

Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980) 10

Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924) 10

Wagner v. Sperry Univac, 458 F.Supp. 505 (E.D. Pa. 1978), aff'd mem. 624 F.2d 1092 (3d Cir. 1980). 10

Wilkerson v. Siegfried Insurance Agency, Inc., 621 F.2d 1042 (10th Cir. 1980) 8

Wilkerson v. Siegfried Insurance Agency, Inc., 683 F.2d 344 (10th Cir. 1982) 10

Woodburn v. LTV Aerospace Corp., 531 F.2d 750 (5th Cir. 1976). 15

Zipes v. Trans World Airlines, Inc., 50 U.S.L.W. 4238 (February 24, 1982) 4

RULES

Rules of the Supreme Court
Rule 17 16

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* 4

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e *et seq.* 4

OTHER AUTHORITIES

House of Representatives Conference Report No. 95-950, 95th Cong., 2d Sess. 12 (1978), *reprinted in* [1978] 3 *U.S. Code Cong. & Ad. News* 528, 534. 14

Moore's Federal Practice, Vol. 13, p. SC17-22 6

IN THE

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October Term 1982

No. 82-325

BERLIN L. LAWSON,

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v.

BURLINGTON INDUSTRIES, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Burlington Industries, Inc. respectfully opposes the Petition for a Writ of Certiorari seeking to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on July 22, 1982.

STATEMENT OF THE CASE *1

For a concise statement of the case, Respondent refers the Court to the summary of facts and proceedings below contained in the opinion of the Fourth Circuit Court of Appeals in this action, reprinted in the Appendix to the Petition, A. 2-7. The following additional facts are material to the Court's consideration: Petitioner complained to officials of the Respondent about Petitioner's layoff and the alleged discriminatory transfer of Daniel Richardson at the time of (or shortly before) the layoff, specifically alleging age discrimination.

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*1 For Questions Presented, List of Parties, Opinions Below, Jurisdictional Grounds, and Statutory Provisions Involved, see PETITION.

Respondent offered Petitioner its explanation of the selection of Daniel Richardson for transfer, and more than 180 days elapsed before Petitioner filed his charge of discrimination with the Equal Employment Opportunity Commission. Petitioner, a former supervisor, was aware of the existence of a law prohibiting discrimination on the basis of age. A copy of the charge of discrimination in this case is attached to this Brief as Appendix page 1.

ARGUMENT

I. THE COURT OF APPEALS' DETERMINATION THAT PETITIONER HAS NOT MADE A SHOWING OF EQUITABLE CONSIDERATIONS SUFFICIENT TO TOLL THE STATUTE'S FILING REQUIREMENT IS IN ACCORDANCE WITH THE GENERAL PRINCIPLES OF EQUITY ENUNCIATED BY THIS COURT, IS NOT IN CONFLICT WITH ANY RULING OF ANY OTHER CIRCUIT COURT OF

APPEALS, AND DOES NOT PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW.

It should be noted at the outset that the Court of Appeals' decision in this case was made with the benefit of the guidance presented by Zipes v. Trans World Airlines, Inc., 50 U.S.L.W. 4238 (February 24, 1982)*2. Thus, the Court did not treat Petitioner's failure to file his charge of discrimination within 180 days of the layoff complained

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*2 In many areas, including the administrative prerequisites to litigation, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., (hereinafter "Title VII") is instructive in cases arising under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (hereinafter "ADEA"), and vice versa. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979); Zipes v. Trans World Airlines, Inc., supra at 4240, n. 11; Smith v. Flax 618 F.2d 1062 (4th Cir. 1980).

of as a jurisdictional defect absolutely barring this action but, rather, examined the equitable considerations propounded by Petitioner in favor of "tolling" the statute's filing requirement and found them lacking.

Petitioner's primary argument appears to be that the Court of Appeals' decision in this case presumably conflicts with a ruling of the Third Circuit Court of Appeals rendered in Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1978). A close comparison of the two cases does not bear out this conclusion. First, the differences in the nature, quality and context of the respective defendant companies' representations of employment possibilities are solely

factual and therefore not an appropriate issue for review via writ of certiorari.

> "Nor will differences between two circuits likely be accepted as a sufficient conflict 'if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved.'" 13 Moore's Federal Practice ¶817.21, p. SC17-22 at n. 11, citing Harlan, "Manning The Dikes" (1958), 13 Record NYCBA 541, 552 at n. 9.

Moreover, a significant distinction is that Mr. Bonham, unlike Petitioner here, raised by affidavit the additional factual issue that, through the defendant company's own wrong-doing (i.e., failure to post the required notices informing employees of the statutory protections of the ADEA), he was unaware of his rights under the ADEA at the very time he was

being "lulled" into inactivity. Petitioner here has not raised a similar argument, nor could he: as a former supervisor, he testified at his deposition that he was aware of a law prohibiting age discrimination and complained of age discrimination to company officials at the time he was laid off. The same distinctions were drawn in Wagner v. Sperry Univac, 458 F.Supp. 505 (E.D. Pa. 1978), aff'd mem. 624 F.2d 1092 (3d Cir. 1980), which case was cited by the Court of Appeals in this case, thus indicating that the court was not, as supposed by Petitioner, unmindful of the Bonham decision but rather distinguished it on the grounds suggested by Wagner.

The other factors cited by Petitioner for equitable consideration [payment of severance pay and existence of recall rights] have been widely rejected by other courts. See, e.g., Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981); Payne v. Crane Co., 560 F.2d 198 (5th Cir. 1977); Davis v. RJR Foods, Inc., 420 F.Supp. 930 (S.D.N.Y. 1976), aff'd mem. 556 F.2d 555 (2d Cir. 1977); Wilkerson v. Siegfried Insurance Agency, Inc., 621 F.2d 1042 (10th Cir. 1980). The same result has been reached in Title VII cases. Doski v. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Krzyzewski v. Metropolitan Government, 584 F.2d 802 (6th Cir. 1978); Greene v. Carter Carborator Co., 532 F.2d 125

(8th Cir. 1976); Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (en banc.). Moreover, it is interesting to note that in Delaware State College v. Ricks, 449 U.S. 250 (1980), Justice Stevens (arguing in dissent for a more liberal construction of the filing requirement in Title VII cases) specifically rejected the suggestion that severance benefits might further extend the statute of limitations; this, he reasoned, would present too indefinite a rule. 449 U.S. at 265, n.1.

As noted on page 5 of the Petition, the facts in this case are "largely undisputed." Four federal judges have now considered these facts and have unanimously agreed on their

significance: they do not constitute an adequate basis for invoking equitable tolling. This factal evaluation does not present an important federal question for this Court to decide. See, e.g., Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924). The standards utilized by both courts are in accordance with the standards applied in other similar cases. Wilkerson v. Siegfried Insurance Agency, Inc., 683 F.2d 344 (10th Cir. 1982); Reeb v. Economic Opportunity Atlanta, Inc. 516 F.2d 924 (5th Cir. 1975); CitiCorp Person-to-Person Fin. Corp. v. Brazell, 658 F.2d 232 (4th Cir. 1981); Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982). Moreover, equitable considerations and the standards to

be applied when tolling of a statute of limitations is sought are not novel questions. [see, e.g., Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976)] and there is no indication that either court in this case has deviated from these traditional standards.

Even if the lower courts have incorrectly determined the tolling issue, the basis of the district court's decision is factual and resolution of the alleged error by this Court would have no significance beyond this case. Therefore, review by writ of certiorari is not warranted on this issue. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923).

II. THE COURT OF APPEALS' CONCLUSION THAT PETITIONER'S EEOC CHARGE ALLEGING DISCRIMINATORY LAYOFF

WAS NOT SUFFICIENTLY BROAD TO SUPPORT A SUBSEQUENT ACTION FOR ALLEGED DISCRIMINATORY FAILURE TO REHIRE IS IN ACCORDANCE WITH THE GENERAL PRINCIPLES ENUNCIATED BY THIS COURT AND DOES NOT PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF FEDERAL LAW.

While this Court has never specifically addressed the narrow issue decided by the lower courts in this action, the guidance offered by the expressed legislative intent as well as general principles developed in cases arising under the ADEA and Title VII indicate that the conclusion reached by the Fourth Circuit Court of Appeals does not constitute a substantial deviation from established federal principles.

It is abundantly clear that a major congressional priority in the scheme of civil rights legislation is

the prominant role of voluntary compliance, achieved through mandatory deferral to administrative procedures now consolidated under the jurisdiction of the EEOC. Oscar Mayer & Co. v. Evans, supra [ADEA]; Love v. The Pullman Co., 404 U.S. 522 (1972) [Title VII]. If a plaintiff can circumvent these procedures and still gain access to the federal courts, the legislative intent will have been frustrated.

The lower courts' decisions, contrary to Petitioner's implications, do not advocate a hypertechnical or unreasonably narrow reading of every charge. The standard (at least in the Fourth Circuit) has long been that a litigant can raise any issue of discrimination stated in the charge itself or developed in the course of a

reasonable investigation of that charge. King v. Seaboard Coastline R.R. Co., 538 F.2d 581, 583 (4th Cir. 1976); EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976). This test is consistent with the expressed legislative intent of the 1978 amendments to the ADEA which deleted the "notice of intent to sue" requirement and substituted therefor the current "charge" requirement:

> "Therefore, the conferees intend that the 'charge' requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory." H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12 (1978), reprinted in [1978] 3 U.S. Code Cong. & Ad. News, 528, 534 (emphasis added).

In the present case, the District Court and the Court of Appeals concluded that

the complaint's allegations regarding discriminatory failure to re-hire would not, if proved, constitute a continuing violation and were not otherwise embraced by the charge of discriminatory layoff (attached hereto at A.1).[*3] This interpretation of the scope of discrimination alleged in Petitioner's charge does not present an important or unsettled issue of federal law. Accordingly, review by writ of certiorari is not warranted on this issue.

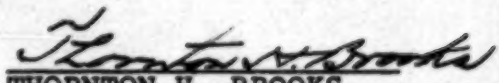
[*3] Many other courts have similarly concluded that layoff and rehiring are distinct issues. See Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977); Woodburn v. LTV Aerospace Corp., 531 F.2d 750 (5th Cir. 1976); Morris v. Frank IX & Sons, Inc., 486 F.Supp. 728 (W.D. Va. 1980); Cutright v. General Motors Corp., 486 F.Supp. 590 (W.D. Pa. 1980); Mazzare v. Burroughs Corp., 473 F.Supp. 234 (N.D. Pa. 1979).

CONCLUSION

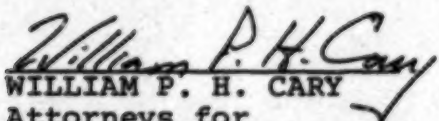
Petitioner has completely failed to establish the "special and important reasons" for the granting of a writ of certiorari, as required by Rule 17 of the Rules of the Supreme Court. The standards applied by the Court of Appeals in this case are in accordance with the general rules developed by this Court and the courts of the various circuits in discrimination cases and do not present important questions of federal law in need of resolution by this Court. The petition for a writ of

certiorari should therefore be denied.

Respectfully submitted,



THORNTON H. BROOKS



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DATED: September 1982

APPENDIX 1

(PLEASE PRINT OR TYPE)

CHARGE OF DISCRIMINATION

EEOC 017801029

Equal Employment Opportunity Commission

Mr. Bebel Lawson — 672 1425

Rt. 2 Box 325 — Randall

Lincolnton North Carolina 28092

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below).

Burlington Industries

Asheboro North Carolina 27203

RECEIVED
EEOC GREENSBORO AREA OFFICE
GREENSBORO, N. C.
DATE: 6 02 0810

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN

Age Discr

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year)

June 30 1979

THE PARTICULARS ARE:

I. I was laid off for reorganization purposes on June 30, 1979. I have worked for the company for 20 yrs and have outfalled Overall several other employees. The company employs more than 20 persons.

II Robert Jenkins Personnel Manager told me that due to the reorganization of the company I would have to be laid off because there were to many and. He also stated that as soon something became available I would be rehired

III That I have been discriminated against because of my age because

A) Daniel Richardson 36 received the position of Curtis Fleming

B) I had more experience and a better work record on my opinion than Daniel did.

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

I declare under penalty of perjury that the foregoing is true and correct.

2/1/82 — Bebel Lawson

SIGNATURE OF COMPLAINANT